

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Deferral of Licensing of MTA Commercial) PP Docket No. 93-253
Broadband PCS) ET Docket No. 92-100
)

MEMORANDUM OPINION AND ORDER

Adopted: June 23, 1995

Released: June 23, 1995

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On April 12, 1995, the Wireless Telecommunications Bureau ("Bureau") issued an *Order* denying the "Emergency Motion to Defer MTA PCS Licensing" filed by Communications One, Inc. ("CommOne"), which sought to delay issuance of the 99 A and B block licenses in the 2 GHz Personal Communications Service ("broadband PCS").¹ We have received two pleadings requesting review of the *CommOne Order* and seeking a stay of some or all grants of A and B block licenses until the broadband PCS C block auction is concluded. First, on May 12, 1995, CommOne, now joined by GO Communications Corporation ("GO"), filed a petition for reconsideration of the *CommOne Order* by the full Commission and requested a stay of licensing of the three largest A and B block auction winners: AT&T Wireless PCS, Inc. ("AT&T Wireless"), PCS Primeco, L.P. ("PCS Primeco"), and WirelessCo, L.P. ("WirelessCo").² Also on May 12, 1995, the National Association of Black Owned Broadcasters ("NABOB"), Percy E. Sutton ("Sutton"), and the Washington Bureau of the National Association for the Advancement of Colored People ("NAACP") (collectively, "NABOB Petitioners") filed an application for review of the *CommOne Order* and a stay of all A and B block licensing.³ We conclude that

¹ Deferral of Licensing of MTA Commercial Broadband PCS, *Order*, PP Docket No. 93-253, ET Docket No. 92-100 (Wireless Telecom. Bur., released April 12, 1995) (*CommOne Order*).

² Petition for Reconsideration By the Full Commission of Denial of Communications One, Inc. Emergency Motion to Defer MTA PCS Licensing, filed May 12, 1995 ("CommOne/GO Petition").

³ Application for Review and Request for Stay, filed May 12, 1995 ("NABOB Petitioners' Application").

both petitions should be denied.⁴

II. CONTENTIONS OF THE PARTIES

2. CommOne/GO Petition for Reconsideration. CommOne and GO (collectively, "CommOne/GO") seek reconsideration of the *CommOne Order* on the grounds that: (1) the Bureau failed to consider "novel questions of law," and (2) factual circumstances with respect to the timing of PCS auctions and licensing have changed since the *CommOne Order* was adopted. On the first point, CommOne/GO argue that the Commission allowed the A and B block auction to result in an excessive concentration of licenses in the hands of the three largest bidders, thereby violating Section 309(j) of the Communications Act of 1934 (the "Act").⁵ In support of their allegation of excessive concentration, CommOne/GO submit an analysis of the A and B block licensing results prepared by Dr. A. Daniel Kelley of Hatfield Associates. Using the Herfindahl - Hirschman Index ("HHI"), a method of measuring market concentration used by the Department of Justice, Dr. Kelley contends that the PCS market will be excessively concentrated unless the A, B, and C block licenses are issued simultaneously.⁶

3. CommOne/GO also argue that the *CommOne Order* should be reconsidered based on changed circumstances that have increased the potential delay between licensing of the A and B blocks on the one hand and the C block on the other.⁷ CommOne/GO note that on March 15, 1995, a week after the filing of CommOne's original emergency motion, the United States Court

⁴ The NABOB Petitioners have also filed a Petition to Deny and Request for Stay with respect to all 99 A and B block licenses. We deny the petition and grant the licensees in a separate Order adopted today. Application for A and B Block Broadband PCS Licenses, *Order*, DA 95-1411 (Wireless Telecom. Bur., released June 23, 1995). In separate Orders adopted today, we also deny the following petitions to deny filed against individual A and B block auction winners: (1) Petition of WirelessCo, L.P. to Deny or Condition License Grant, filed May 12, 1995 against Pacific Telesis Mobile Services for the San Francisco B block MTA (File No. 0006-CW-L-95); (2) Petition of Cox Enterprises, Inc. to Deny or Condition License Grant, filed May 12, 1995 against Pacific Telesis Mobile Services for the Los Angeles B block MTA (File No. 0002-CW-L-95); and (3) four Joint Petitions to Dismiss or Deny, Without Prejudice, or, in the Alternative, to Defer, filed May 12, 1995, by Advanced MobileComm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc. against (a) WirelessCo for the San Francisco A Block MTA (File No. 0005-CW-L-95), (b) Pacific Telesis Mobile Services for the San Francisco B block MTA (File No. 0006-CW-L-95); (c) AT&T Wireless PCS for the Boston A Block MTA (File No. 0013-CW-L-95), and (d) WirelessCo for the Boston B block MTA (File No. 0014-CW-L-95). See *Order*, DA 95-1412 (Wireless Telecom. Bur., released June 23, 1995) (AMT/DSST Petition); *Order*, DA 95-1413 (Wireless Telecom. Bur., released June 23, 1995) (Cox Petition); *Order*, DA 95-1414 (Wireless Telecom. Bur., released June 23, 1995) (WirelessCo Petition).

⁵ CommOne/GO Petition at 5-11.

⁶ *Id.* at 7-8. Declaration of A. Daniel Kelley ("Kelley Declaration") at 3-5.

⁷ *Id.* at 11-14.

of Appeals for the District of Columbia Circuit issued a stay of the C block auction,⁸ which was not lifted until May 1, 1995. According to CommOne/GO, the *TEC Stay Order* caused considerable delay and disruption to the efforts of potential C block bidders to obtain capital, and the Commission compounded this effect by the auction schedule that it set after the stay was lifted.⁹ CommOne/GO argue that the impact of these recent delays on the potential economic viability of the C block must be assessed on reconsideration.¹⁰

4. Finally, CommOne/GO contend that they are entitled to a stay of A and B block licensing with respect to the three largest auction winners under the four-prong test set forth in *Washington Metropolitan Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977) (*Holiday Tours*). First, CommOne/GO contend that they are likely to prevail on the merits of their claim that awarding licenses to AT&T Wireless, PCS Primeco, and WirelessCo in advance of licensing the C block would create excessive market concentration in violation of Section 309(j). Second, CommOne/GO allege that C block licensees will be irreparably harmed by the "headstart" otherwise given to three dominant PCS providers. Third, CommOne/GO argue that the A and B block winners cannot claim to be harmed by a delay that would "merely level[] the playing field as Congress intended." Fourth, CommOne/GO assert that a stay will serve the public interest by ensuring more vigorous competition.¹¹

5. NABOB Petitioners' Application for Review. Unlike CommOne/GO, NABOB Petitioners style their appeal of the *CommOne Order* as an application for review under Section 1.115 of the Commission's rules. In support of their application, NABOB Petitioners argue that the Commission violated Section 309(j) of the Communications Act by failing to provide adequate opportunities for minorities to acquire PCS licenses in the A and B blocks.¹² They further allege that this failure to provide incentives has allowed a few dominant carriers to divide PCS licenses in an unlawful territorial allocation in violation of the antitrust laws.¹³ NABOB Petitioners further contend that, in light of the *TEC Stay Order* and other possible legal challenges to the C block auction, the auction is likely to be delayed and the A and B block winning bidders will have an insurmountable headstart if licensing is not deferred until the C block auction is completed.¹⁴

⁸ See *Telephone Electronics Corporation v. FCC*, No. 95-1015 (Order, March 15, 1995) (*TEC Stay Order*).

⁹ CommOne/GO Petition at 11-12.

¹⁰ *Id.* at 13-14.

¹¹ *Id.* at 14-16.

¹² NABOB Petitioners' Application at 4-6, 10-11.

¹³ *Id.* at 11-15.

¹⁴ *Id.* at 7-9.

6. Like CommOne/GO, NABOB Petitioners contend that their request to stay all A and B block licensing meets the four-prong *Holiday Tours* test. With respect to the merits, NABOB Petitioners contend that licensing of A and B blocks in advance of C block violates Section 309(j) by depriving minorities of any "meaningful opportunity" to participate in broadband PCS.¹⁵ In addition, NABOB Petitioners argue, minorities who plan to participate in the C block auction will be irreparably harmed by loss of capital, base station cell sites, access to distributors and retailers, and market share if A and B licensees are allowed to gain a headstart in the market.¹⁶ Conversely, NABOB Petitioners claim, a stay will not cause significant harm to the A and B block winners because they are not required to pay the remaining 80 percent balance on their auction payments until the Commission grants their licenses.¹⁷ Finally, NABOB Petitioners claim that a stay will serve the public interest by avoiding excess concentration of licenses and providing minorities with greater opportunity to obtain PCS licenses.¹⁸

7. Oppositions. Virtually all of the A and B block winners filed oppositions to the CommOne/GO Petition and/or the NABOB Petitioners' Application.¹⁹ For example, in response to CommOne/GO's reconsideration request, PCS Primeco argues that the *CommOne Order* is fully consistent with Section 309(j) and does not reflect a failure to address any "novel" issue of law.²⁰ PCS Primeco also disputes CommOne/GO's claim that licensing the A and B blocks in advance of C block will cause an excessive concentration of licenses and decrease competition.²¹ Specifically, PCS Primeco submits an affidavit from Professor Robert G. Harris of the Haas School of Business, University of California at Berkeley, in response to the HHI analysis of PCS

¹⁵ *Id.* at 17.

¹⁶ *Id.* at 18-19.

¹⁷ *Id.* at 19-20.

¹⁸ *Id.* at 20.

¹⁹ Oppositions to the CommOne/GO Petition were filed by Bell South Personal Communications and PCS Primeco. Oppositions to the NABOB Petitioners Application were filed by Communications International Corporation, GTE Macro Corporation, Pacific Telesis Mobile Systems, and (jointly) WirelessCo and PhillieCo. Consolidated oppositions to both pleadings were filed by Ameritech Wireless Communications and PCS Primeco. In addition, some A and B block applicants have addressed the NABOB Petitioners' stay request in their oppositions to the NABOB Petitioners' separate Petition to Deny and Request for Stay. See Oppositions of Communications International Corporation at 6-8, Cox Communications at 6-18, GCI Communications Corporation at 7-9, Powertel PCS Partners at 6-8, Western PCS Corporation at 7-9, and WirelessCo (jointly with PhillieCo) at 15-21. We incorporate these pleadings by reference.

²⁰ PCS Primeco Opposition to Petition for Reconsideration ("PCS Primeco Opposition") at 6-7.

²¹ *Id.* at 4-6.

prepared by Dr. Kelley. Professor Harris states that Dr. Kelley's analysis is flawed because it treats PCS as a discrete product market. Professor Harris contends that the relevant product market is mobile communications generally, and asserts that licensing of the A and B blocks will significantly increase, not decrease, competition in this market.²²

8. Opponents also dispute NABOB Petitioners' contention that the Commission's structuring and sequencing of PCS auctions violates Section 309(j) by failing to provide sufficient opportunities for minority participation in the A and B block auctions.²³ Pacific Telesis notes that providing opportunities for minority participation in PCS is only one of several objectives articulated by the statute, and that the Commission has properly balanced this goal against such other objectives as promoting rapid deployment of service, recovering a portion of the spectrum's value for the public, and ensuring efficient spectrum use.²⁴ WirelessCo argues that the Commission fully weighed -- and rejected -- NABOB Petitioners' arguments in the rulemaking process.²⁵ Indeed, WirelessCo notes, the Commission expressly concluded that holding the C block auction after the A and B block auctions would benefit designated entities in significant ways.²⁶

9. Opponents contend that neither the CommOne/GO Petition nor the NABOB Petitioners' Application satisfies the *Holiday Tours* requirements for obtaining a stay. First, opponents argue that petitioners' claims of statutory violations and excessive concentration in the A and B auction results are unlikely to succeed on the merits for the reasons stated above. These claims, opponents contend, constitute a belated and improper attempt to seek reconsideration of the Commission's PCS auction rules long after the rulemaking process has been completed.²⁷ Opponents also dispute that licensing of A and B blocks in advance of C block will cause

²² Declaration of Dr. Robert C. Harris ("Harris Declaration") at 4-5.

²³ See, e.g., Cox Communications Opposition to NABOB Petitioners' Petition to Deny ("Cox Opposition") at 7-10, GCI Motion to Dismiss at 6, Pacific Telesis Mobile Systems Opposition to Request for Stay ("Pacific Telesis Opposition") at 10-13, PCS Primeco Consolidated Opposition at 7-10.

²⁴ Pacific Telesis Opposition at 11-13.

²⁵ WirelessCo/PhillieCo Opposition to Request for Stay ("WirelessCo Opposition") at 4-5.

²⁶ *Id.*

²⁷ See, e.g., GTE Macro Corporation Opposition to Requests for Stay ("GTE Macro Opposition") at 5, PCS Primeco Consolidated Opposition at 6-14.

irreparable harm by giving A and B block licenses an insurmountable "headstart" advantage.²⁸ Opponents argue that the Bureau properly found this argument to be purely speculative in the *CommOne Order*. PCS Primeco argues that the history of the cellular industry shows there is no meaningful or lasting advantage to being licensed first.²⁹ Pacific Telesis further points out that if staggered licensing puts C block licensees at any disadvantage, it will translate into lower prices for the licenses at auction.³⁰ Conversely, opponents contend, a stay will indeed harm A and B block bidders, who already have paid approximately \$1.4 billion in auction payments, and the public, which will suffer a delay in the introduction of PCS services.³¹ Finally, opponents contend that the public interest will best be served by prompt licensing of the A and B blocks.³²

10. Replies. In reply, CommOne/GO contend that the Bureau did not address their market concentration argument in the *CommOne Order*, rendering it a "novel" issue that must be addressed on reconsideration.³³ CommOne/GO further argue that the Commission's original decision in PP Docket 93-253 not to delay licensing of A and B blocks was premised on the C block auction occurring no more than 75 days later, and that subsequent events have made a much longer delay likely.³⁴ Finally, in response to opponents' criticisms of their HHI analysis of the PCS market, CommOne/GO provide an alternative analysis which they contend shows excessive concentration even if PCS and cellular are treated as a single product market.³⁵

²⁸ See, e.g., Ameritech Wireless Consolidated Opposition at 4-5, Cox Opposition 13-15, GCI Communications Motion to Dismiss at 8-9, GTE Macro Opposition at 5-6, Pacific Telesis Opposition at 14-16, PCS Primeco Consolidated Opposition at 15-16, WirelessCo Opposition at 6-7.

²⁹ PCS Primeco Consolidated Opposition at 13-14.

³⁰ Pacific Telesis Opposition at 15.

³¹ See, e.g., Ameritech Wireless Consolidated Opposition at 5-6, Cox Opposition at 15-17, GCI Communications Motion to Dismiss at 9, Pacific Telesis Opposition at 16-20, PCS Primeco Consolidated Opposition at 16-18, WirelessCo Opposition at 19-20.

³² See, e.g., Cox Opposition at 17-19, Pacific Telesis Opposition at 14-16, PCS Primeco Consolidated Opposition at 18-19, Powertel PCS Partners Opposition at 8, Western PCS Opposition to Petition to Deny and Request for Stay at 8-9, WirelessCo Opposition at 8-9.

³³ CommOne/GO Reply to Oppositions at 3-4.

³⁴ *Id.* at 5-6.

³⁵ *Id.* at 10-14, Declaration of A. Daniel Kelley ("Kelley Reply Declaration") at 3.

11. NABOB Petitioners' reply asserts that opponents have misconstrued the *Holiday Tours* factors and that the balance of hardships weighs strongly in favor of a stay. NABOB Petitioners state that *Holiday Tours* merely requires them to present a "substantial case" on the merits, not demonstrate a probability of success.³⁶ NABOB Petitioners further contend that they will suffer significant competitive disadvantage if A and B block licenses are granted before C block licenses, whereas the harm to A and B block bidders from being unable to recoup their 20 percent auction payments is "an irritant" but not a burden that threatens their viability.³⁷

III. DISCUSSION

A. Procedural Matters

12. As a preliminary matter, we address the procedural posture of the CommOne/GO Petition and the NABOB Petitioners' Application, which take different positions on the appropriate procedure for review of the *CommOne Order*. CommOne/GO style their petition as a petition for reconsideration under Section 1.106, claiming that new issues of law and fact exist that previously have not been presented to the Bureau. Because of the importance of the issues raised, however, CommOne/GO request that their petition be considered by the full Commission.³⁸ NABOB Petitioners, on the other hand, seek review of the *CommOne Order* under Section 1.115, which entitles them to full Commission review provided that *no* new questions of law or fact are raised.

13. Section 1.106(a) states that a petition for reconsideration of an action taken pursuant to delegated authority may be acted on by the delegated authority or referred to the full Commission.³⁹ Section 1.106(c) provides that a reconsideration petition "which relies on facts not previously presented" may be granted only if (1) the petition relies on facts or circumstances "which have changed since the last opportunity to present such matters," (2) the petition relies on facts that were unknown and could not reasonably have been learned by the petitioner "through the exercise of ordinary diligence," or (3) the Commission or delegated authority reviewing the petition determines that consideration of the facts relied on is in the public interest.⁴⁰

³⁶ NABOB Petitioners' Consolidated Reply to Oppositions at 3.

³⁷ *Id.* at 4.

³⁸ CommOne/GO Petition at 5 n.8.

³⁹ 47 CFR § 1.106(a).

⁴⁰ *Id.*, § 1.106(c); *see also* § 1.106(b)(1), (2).

14. We conclude that the CommOne/GO petition for reconsideration of the *CommOne Order* raises new factual issues that should be addressed by the Bureau. First, the petition presents arguments with respect to alleged market concentration in the A and B auction results that were not previously presented to the Bureau by CommOne. While we note that CommOne *could* have raised these issues in its prior pleadings,⁴¹ we believe that full consideration of the issues at this juncture is nonetheless in the public interest.

15. Second, we believe it is appropriate to evaluate the impact of events affecting the C block auction that have occurred since the *CommOne Order*, and indeed since CommOne/GO sought review of the *Order*. At the time the *CommOne Order* was released, the C block auction was indefinitely stayed by the D.C. Circuit under the *TEC Stay Order*. On May 1, 1995, the court lifted the stay, and the Commission shortly thereafter scheduled the C block auction for August 2, 1995. On June 12, 1995, in the case of *Adarand Constructors, Inc., v. Federico Peña (Adarand)*, the United States Supreme Court held that all racial classifications, whether imposed by federal, state, or local governments, must be analyzed by the reviewing court under strict scrutiny.⁴² Following *Adarand*, we issued a Public Notice on June 13, 1995 delaying the short form filing deadline for the C block auction. On June 23, 1995, the Commission adopted a *Notice of Proposed Rulemaking* to modify the C block auction rules and issued a Public Notice announcing that the C block auction will begin on August 29, 1995.⁴³ We will evaluate the CommOne/GO Petition in light of these recent events.

16. For the same reasons, we conclude that the NABOB Petitioners' application for review should be treated as a petition for reconsideration subject to review by the Bureau, rather than as an application for review by the full Commission. Section 1.115(c) provides that no application for review will be granted if it relies on "questions of fact or law on which the designated authority has been afforded no opportunity to pass."⁴⁴ The NABOB Petitioners' Application presents many of the same arguments as the CommOne/GO Petition, which rely on factual allegations not previously presented to the Bureau. We therefore conclude that the NABOB Petitioners' Application cannot be considered by the full Commission under Section

⁴¹ CommOne's original Emergency Motion was filed on March 8, 1995, five days before the conclusion of the A and B block auction. CommOne also filed a reply pleading on March 27, 1995, two weeks after the auction concluded. Although the A and B block auction results were known at the time of CommOne's reply, CommOne did not raise any issue regarding concentration of licenses at that point.

⁴² 63 U.S.L.W. 4523 (U.S. June 12, 1995).

⁴³ *Further Notice of Proposed Rule Making*, PP Docket No. 93-252, FCC 95-263 (adopted June 23, 1995); Public Notice, "FCC Sets August 29th Auction Date for 493 BTA Licenses Located in the C Block for Personal Communications Services In the 2 GHz Band," released June 23, 1995.

⁴⁴ 47 CFR § 1.115(c).

1.115(c) until the Bureau has addressed these issues.

B. Reconsideration

17. In its original "Emergency Motion" to defer A and B block licensing, CommOne argued that C block licensees would be at a significant competitive disadvantage in comparison to A and B block licensees unless licenses in all three blocks were awarded simultaneously. In the *CommOne Order*, we concluded that CommOne's arguments constituted an untimely petition for reconsideration of the Commission's decision in PP Docket No. 93-253 to auction and license the A and B blocks first.⁴⁵ We further concluded that the possibility of delay in the C block auction was a contingency anticipated by the Commission in making its decision, and that this contingency therefore did not present a "new circumstance" justifying reconsideration of the issue.⁴⁶ Finally, we concluded that CommOne had failed to meet the four-prong *Holiday Tours* test for grant of a stay. In particular, we found that it had failed to show that it would be irreparably harmed by grant of the A and B block licenses or that a stay would be in the public interest.⁴⁷

18. CommOne/GO and the NABOB Petitioners urge reconsideration of the *CommOne Order* on the grounds that: (1) granting A and B block licenses in advance of designated entity C block licenses violates Section 309(j) of the Act by failing to provide opportunities for designated entities and causing excessive concentration in the PCS market; and (2) the threat of competitive harm to C block licensees caused by giving A and B block licensees a "headstart" has increased because of recent delays to the C block auction schedule. CommOne/GO and NABOB Petitioners further contend that, in light of these "new circumstances" not previously presented to the Bureau, they have satisfied all four prongs of the *Holiday Tours* test.

19. As in the *CommOne Order*, we find the CommOne/GO Petition and the NABOB Petitioners' Application to be untimely to the extent they seek reconsideration of the Commission's rules adopted in PP Docket No. 93-253 with respect to the structure and sequencing of PCS auctions. These rules were adopted in the *Fifth Report and Order* and reviewed on reconsideration in the *Fourth Memorandum Opinion and Order* in that docket, and the deadline for reconsideration of these rules has long since passed.⁴⁸ We therefore treat the

⁴⁵ *CommOne Order* at paras. 2-5.

⁴⁶ *Id.* at para. 5.

⁴⁷ *Id.* at paras. 6-7.

⁴⁸ Implementation of Section 309(j) of the Communications Act, Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5546-5548, *recon.*, *Fourth Memorandum Opinion and Order*, 9 FCC Rcd 6858, 6863-6864 (1994).

petitions as requesting reconsideration of our decision in the *CommOne Order* to deny a stay under the *Holiday Tours* test, and we review the "new circumstances" alleged by both pleadings under that test. As set forth below, our conclusion is that CommOne/GO and NABOB Petitioners again fail to satisfy the *Holiday Tours* test, and that both petitions should therefore be denied.

1. Likelihood of Success on the Merits

20. As noted above, CommOne/GO argue that, in the *CommOne Order*, the Bureau failed to consider the degree of concentration in PCS resulting from the A and B block auction. Based on the number of markets won by the top three bidders, CommOne/GO argue that the Commission has failed to meet the statutory objective under Section 309(j)(3)(B) of "avoiding excessive concentration" of licenses.⁴⁹ Similarly, NABOB Petitioners argue that the A and B block auction results violate this same provision because the Commission has not met the statutory goal of "disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by minorities and women."⁵⁰ CommOne/GO and NABOB Petitioners argue that the only way to implement these statutory goals is to delay the introduction of PCS services generally until they can be provided by these designated entities.

21. Nothing in the statute or its legislative history requires such a result. In directing the Commission to establish competitive bidding rules for PCS, Congress enumerated three other objectives in Section 309(j)(3) besides the one cited by CommOne/GO and NABOB Petitioners: (1) development and rapid deployment of services with a minimum of administrative and judicial delay; (2) recovery for the public of a portion of the value of the spectrum; and (3) promoting efficient and intensive use of the spectrum.⁵¹ In its auction rules, the Commission has properly balanced these objectives with the Section 309(j)(3)(B) goal of diversity in license ownership by establishing PCS frequency blocks of varying sizes and service areas, reserving certain of these blocks for entrepreneurs, and creating special provisions for designated entities to bid for licenses in those blocks.⁵² We do not believe the statute further requires the Commission to promote diversity at the cost of delaying much-needed service that could otherwise be provided to the

⁴⁹ CommOne/GO Petition at 5-11.

⁵⁰ NABOB Petitioners' Application at 10-12.

⁵¹ 47 U.S.C. §309(j)(3)(A), (C), and (D), respectively.

⁵² Implementation of Section 309(j) of the Communications Act, Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5584-5588, *recon.*, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 412-414 (1994). We note that the *Adarand* decision does not implicate the Commission's decision to designate certain PCS spectrum blocks as entrepreneurs' blocks, because the Commission's entrepreneurs' block criteria are based on size, not race.

public.

22. To bolster their statutory argument, CommOne/GO claim that their HHI analysis shows excessive levels of concentration of PCS licenses in the A and B blocks, which can only be remedied by simultaneous licensing of C block.⁵³ Because no PCS provider is yet providing service, CommOne/GO's HHI analysis is based on "pops," *i.e.*, the number of people in each PCS license area, rather than on the number of customers or some other measurement of actual market share. CommOne/GO's initial analysis also assumes that the relevant product market is PCS, thus excluding the potential competitive impact of cellular and other wireless services from the model.⁵⁴ Based on these assumptions, the CommOne/GO model yields a HHI of 2010.5 for A and B block PCS licenses nationwide, which exceeds the Department of Justice benchmark of 1800 for a "highly concentrated" market.⁵⁵ When licensing of the C block is assumed, the HHI decreases to 963.0, which the Department of Justice regards as "unconcentrated."⁵⁶

23. We agree with PCS Primeco that CommOne/GO's HHI analysis is significantly flawed.⁵⁷ First, CommOne/GO has limited its product market definition to PCS alone, ignoring the competitive relationship between PCS and other wireless services, particularly cellular. The Commission has consistently recognized that PCS is part of a larger competitive market for mobile telecommunications services.⁵⁸ In fact, a key goal in introducing PCS was to enable it "to compete with existing cellular and private advanced mobile communications services"⁵⁹; thus, it is illogical to measure concentration in PCS alone as if these other services did not exist. By excluding existing services from its analysis, CommOne/GO significantly overstates the level of concentration in PCS while ignoring economic reality.

⁵³ CommOne/GO Petition at 7-8, Kelley Declaration at 5

⁵⁴ Kelley Declaration at 4.

⁵⁵ *Id.*, Table 1.

⁵⁶ *Id.*, Table 2.

⁵⁷ See PCS Primeco Opposition at 4-6, Harris Declaration at 4-6.

⁵⁸ See, e.g., Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988, 8012 (1994) (all CMRS services compete with one another or have the potential to compete with one another); Petition of the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Regulatory Rates, *Report and Order*, PR Docket No. 94-105, FCC 93-195 (adopted May 5, 1995; released May 19, 1995), at para. 32 (potential of entry by PCS within next two years will provide competition for cellular in CMRS market).

⁵⁹ Amendment of the Commission's Rules to Establish New Personal Communications Services, *Second Report and Order*, GEN Docket No. 90-314, 8 FCC Rcd 7700, 7710 (1993).

24. Second, CommOne/GO's analysis also ignores the fundamental fact that licensing of the A and B blocks will significantly *increase* the level of competition in mobile services over what it was previously.⁶⁰ Assuming *arguendo* that two cellular providers in each market represent the "baseline" level of competition, licensing of the A and B blocks will double the number of competitors. Thus, licensing of the A and B blocks represents a fundamental increase in competition. Conversely, CommOne's request to delay A and B block licensing would prolong higher levels of concentration, depriving consumers of the benefits of competition between PCS licensees and incumbent cellular carriers. We conclude that the improved level of competition that will come with A and B block licensing should not be delayed because more "perfect" competition is possible at a later date.

25. In a supplemental affidavit submitted with CommOne/GO's Reply, Dr. Kelley performs a revised HHI analysis that purports to yield a "highly concentrated" HHI in selected MTAs even if a market definition is used that combines cellular and PCS.⁶¹ This revised analysis is no more persuasive than CommOne/GO's initial analysis. First, the revised analysis also ignores the dramatic increase in competition that results from licensing of the A and B blocks.⁶² Second, the revised analysis does not support CommOne/GO's contention that PCS is excessively concentrated on a nationwide basis. Because it looks at each MTA in isolation, CommOne/GO's revised model would yield the same "concentrated" HHIs for each MTA even if all 99 A and B block licenses were held by different entities. Thus, we do not find the revised model to be persuasive or even relevant to the issues raised by CommOne/GO.

2. Irreparable Harm

26. In its original Emergency Motion, CommOne argued that giving A and B block licensees a "headstart" over C block licensees would irreparably harm potential C block auction winners. In the *CommOne Order*, we found this argument to be "purely speculative."⁶³ We noted that additional competitive opportunities remain open to PCS entrants licensed in subsequent auctions, and further noted that, under a staggered licensing process, subsequent entrants could evaluate the business strategies and initial performance of the A and B block licensees in making

⁶⁰ Under the Department of Justice Merger Guidelines, scrutiny is warranted only where a proposed merger would decrease competition by increasing market concentration. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (1992), 57 Fed. Reg. 41552 (August 10, 1992), at § 1.51.

⁶¹ CommOne/GO Reply at 14, Kelley Reply Declaration at 3.

⁶² In a hypothetical MTA with two cellular providers and two PCS providers, Dr. Kelley's model yields an HHI of 2704.1. Kelley Reply Declaration, Appendix B. Yet using this same model, the "cellular/PCS" HHI in any local market area *prior* to the entry of the A and B block licensees would be 5000.

⁶³ *CommOne Order* at para. 6.

their own strategic business decisions. Finally, we concluded that irreparable harm was not shown because any negative impact resulting from the "headstart" given to A and B block winners would be reflected in the auction value of C block licenses.⁶⁴

27. CommOne/GO and NABOB Petitioners urge reconsideration of the *CommOne Order* because of recent delays to the C block auction schedule that they contend will increase the headstart advantage of A and B block licensees and cause competitive harm to designated entities. CommOne/GO contend that the Commission originally contemplated a 75-day interval between the conclusion of the A and B block auctions and the commencement of the C block auction.⁶⁵ NABOB Petitioners contend that minorities who plan to participate in the C block auction are threatened with loss of capital, base station cell sites, access to distributors and retailers, and market share if A and B block licensees are allowed to gain a headstart in the market.⁶⁶

28. While we recognize that *TEC* and, more recently, *Adarand* have affected the timing of the C block auction, we conclude that the revised auction schedule does not warrant a delay in A and B block licensing. We note that the Commission's decision in PP Docket No. 93-253 to license A and B blocks before C block was not based on a particular timetable; in fact, the precise timing of each auction was not known at the time. Similarly, at the time of the *CommOne Order*, the C block auction was indefinitely stayed by the *TEC Stay Order*. Thus, our decision does not turn on a particular timetable or date for the C block auction.

29. We also believe that petitioners' claims of irreparable harm based on a delay of a few months in C block licensing remain speculative at best. To show irreparable harm, "the injury must be both certain and great; it must be actual and not theoretical."⁶⁷ As we stated in the *CommOne Order*, sequential licensing is just as likely to provide strategic advantages as disadvantages to C block licensees.⁶⁸ We also believe that CommOne/GO and NABOB Petitioners overstate the significance of the A and B block licensees being licensed first by ignoring the ten-year headstart that established cellular companies enjoy over *all* PCS licensees. Indeed, in comparison to the "cellular headstart" debate of ten years ago -- which the Commission found did not justify delaying licensing of wireline cellular carriers -- the argument that A and

⁶⁴ *Id.*

⁶⁵ CommOne/GO Petition at 11.

⁶⁶ NABOB Petitioners' Application at 18-19.

⁶⁷ *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

⁶⁸ *CommOne Order* at para. 6. In fact, some potential designated entity applicants urged the Commission to license C block after A and B blocks for precisely this reason. See *Fourth Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 6858, 6863 (1994), at para. 27 (citing comments of BET Holdings, Inc.).

B licensees have a headstart advantage is even less compelling: unlike the wireline cellular carriers, A and B block licensees are not entering a new, untapped market but will be faced with stiff competition from the outset. Finally, as we have noted previously, bidders in the C block auction can adjust their bids to account for any impact on the value of C block licenses resulting from the prior licensing of A and B blocks.

30. Based on these factors, we find that CommOne/GO and NABOB Petitioners have failed to establish irreparable harm. In reaching this conclusion, we fully acknowledge the desirability of licensing C block -- and the remaining PCS blocks -- as soon as reasonably possible. We believe Commission's revised timetable for the C block auction meets this objective. The C block auction is currently scheduled to begin on August 29, 1995, little more than two months from now. Thus, depending on the length of the auction, C block licenses could be awarded before the end of the year or in early 1996. In our view, this schedule will provide ample opportunities for C block licensees to compete effectively in the mobile services marketplace.

3. Harm to Others

31. The third prong of the *Holiday Tours* test is the potential harm a stay would cause to others. CommOne/GO and NABOB Petitioners argue that the A and B block winners should have no objection to awaiting the same "starter's pistol" as C block licensees because they have only paid 20 percent of their auction payments.⁶⁹ This argument ignores economic reality. Collectively, the A and B block winners have paid \$1.4 billion to the United States treasury as a downpayment -- funds that do not earn interest for them and are, in effect, frozen. The A and B block winners also have invested significant funds in start-up costs which cannot begin to be recouped until licenses are issued.⁷⁰ In short, we find significant potential for a stay of licensing to cause harm to the winning A and B block bidders by delaying their entry into the market.

4. Public Interest

32. Finally, we conclude that a stay of A and B block licensing would not be in the public interest. Aside from imposing a financial burden on the A and B block winners themselves, a stay will delay the introduction of new competition and new services to the

⁶⁹ CommOne/GO Petition at 1; NABOB Petitioners' Application at 19-20.

⁷⁰ See, e.g., PCS Primeco Consolidation at 17, Pacific Telesis Opposition at 19-21.

public.⁷¹ Conversely, granting the licenses will further the Congressional directive to promote the development and rapid deployment of PCS for the benefit of the public with a minimum of administrative or judicial delay.⁷² We continue to believe that the public interest in rapidly providing new competitive sources of wireless services outweighs any possible competitive harm that might result from the A and B block licensees being licensed ahead of auction winners in other PCS blocks.

IV. ORDERING CLAUSES

33. Accordingly, IT IS ORDERED that, pursuant to 47 C.F.R. §1.106(c), the Petition for Reconsideration By the Full Commission of Denial of Communications One, Inc. Emergency Motion to Defer MTA PCS Licensing filed by Communications One, Inc. and GO Communications Corporation is DENIED.

34. IT IS FURTHER ORDERED that, pursuant to 47 C.F.R. §§ 1.106(c) and 1.115, the Application for Review and Request for Stay filed by the National Association of Black Owned Broadcasters, Percy E. Sutton, and the Washington Bureau of the National Association for the Advancement of Colored People is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney, Chief
Wireless Telecommunications Bureau

⁷¹ See Pacific Telesis Opposition at 17. Pacific Telesis submits a declaration by Professor Paul Milgrom of Stanford University estimating that a delay in A and B block licensing could result in lost savings to the public of \$225 million per month.

⁷² 47 U.S.C. § 309(j)(3)(A).